

United States
Circuit Court of Appeals

For the Ninth Circuit.

C. A. RASMUSSEN, as Collector of Internal Revenue for the District of Montana,
Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Montana.

~~RE-FILED~~

AUG 14 1931

PAUL F. O'BRIEN,
CLERK.

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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

WELLINGTON D. RANKIN, Esq., of Helena, Montana, United States Attorney for the District of Montana, ARTHUR P. ACHER, Esq., of Helena, Montana, Assistant United States Attorney for the District of Montana, Attorneys for the Appellant.

T. B. WEIR, Esq., and Harry P. Bennett, Esq., of Helena, Mont., Attorneys for Appellee.

In the District Court of the United States for the
District of Montana.

No. 1399

EDDY'S STEAM BAKERY, INC.,
a Corporation,

Plaintiff,

vs.

C. A. RASMUSSEN, as Collector of Internal
Revenue for the District of Montana,
Defendant.

BE IT REMEMBERED, that on the 29th day
of July 1929, Plaintiff filed its complaint herein in
the words and figures following, to-wit: [1*]

*Page number appearing at the foot of page of original certified
Transcript of Record.

In the District Court of the United States, for the
District of Montana.

#1399

EDDY'S STEAM BAKERY, INC.,
a Corporation,

Plaintiff,

vs.

C. A. RASMUSSEN, as Collector of Internal
Revenue for the District of Montana,
Defendant.

COMPLAINT.

Comes now the plaintiff above named and for its cause of action against the defendant above named, shows and avers:

I.

That at all times herein referred to, ever since said times and now, this plaintiff was and is a corporation organized and existing under the laws of the State of Montana, with its principal place of business located at the City of Helena, in the County of Lewis and Clark, State of Montana. That this plaintiff corporation was so organized under the laws of the State of Montana, February 21, 1918, with the corporate name O'Connell and Gallivan Company, and that thereafter and on July 9, 1923, pursuant to the laws of said State of Montana, this plaintiff's corporate name was changed to "Eddy's Steam Bakery, Inc.", by an amendment of the Articles of Incorporation duly made and filed as required by the laws of said last named State. [2]

II.

That the defendant C. A. Rasmusson is now, and ever since the 16th day of January, 1922, has been, a resident and citizen of the State of Montana and the duly appointed, qualified and acting Collector of Internal Revenue for the District of Montana, residing at Helena, within the State of Montana.

III.

That on or about February 9, 1926, the Commissioner of Internal Revenue, purporting to act under the provisions of the Act of Congress commonly referred to as the "Revenue Act of 1921", being the Act of Congress approved November 23, 1921, and particularly under Sections 230 and 301 of Chapter 136 of said Act, and Acts of Congress amendatory thereof and supplemental thereto, did wrongfully and unlawfully levy and assess against this plaintiff income and excess profits taxes termed deficiency assessment as designated in said Act for the calendar year of 1921, in the sum of Three Thousand and Thirty-seven and 41/100 Dollars (\$3037.41), as set forth in the letter of said Commissioner of date February 9, 1926, bearing said Commissioner's reference "IT:CA: 2551—9—60D", a true and exact copy of which letter is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

IV.

That thereafter said defendant Collector did demand of this plaintiff said sum of Three Thousand

and Thirty-seven and 41/100 Dollars (\$3,037.41), together with Seven Hundred and Eighty-two and 22/100 Dollars (\$782.22) interest thereon under said Acts of Congress, making a total demanded by said defendant Collector of this plaintiff of the sum of Three [3] Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63), alleging the same to be due from this plaintiff as such tax so levied by the Commissioner as aforesaid, and pursuant to said demand and by reason of the coercion incident to said assessment, demand and the administrative provisions of said Acts of Congress and the rules and regulations promulgated under said Act for the collection of taxes assessed thereunder, this plaintiff did, on or about November 17, 1926, pay to said Collector at Helena, in Lewis and Clark County, Montana, said sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63) under protest.

V.

That thereafter and on or about March 6th, 1929, this plaintiff filed with said Collector its Claim on form 843 for refund of said taxes so paid, duly verified and sworn to, a copy of which claim and supporting affidavit is hereto attached, marked Exhibit "B", and by this reference made a part of this complaint.

VI.

That in support of said claim there was filed therewith Power of Attorney duly executed by

plaintiff in favor of Hugh D. Galusha of Helena, Montana, a true copy of which Power of Attorney is hereto attached, marked Exhibit "C", and by this reference made a part of this complaint.

VII.

That thereafter and on or about July 12, 1929, said Collector and said Commissioner of Internal Revenue disallowed, denied and refused said claim of refund and so notified this plaintiff by letter, a true copy of which is [4] hereto attached, marked Exhibit "D", and by this reference made a part of this complaint.

VIII.

That prior to December 31, 1920, plaintiff granted, sold, transferred and delivered to one J. E. O'Connell of Helena, Montana, all its property and business.

IX.

That said alleged tax and the assessment, and the whole thereof, is wrongful, unlawful and void, in this that, this plaintiff transacted no business whatever during the calendar year 1921, or any part thereof, and that this plaintiff neither earned, nor received, nor acquired, nor was entitled to any income or profits whatsoever for or during said calendar year 1921.

X.

That said tax and the assessment thereof and said interest thereon was and is wholly unlawful and void.

XI.

That said defendant Collector has refused as aforesaid, and still refuses to return or pay to this plaintiff said Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63), or any part thereof, and so wrongfully and unlawfully holds and retains said Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63) so as aforesaid the money and property of this plaintiff in his possession, and that on said account there is now due and owing from the said defendant to this plaintiff the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63), together with lawful interest, to-wit, interest at the rate of one-half of one per cent a month, [5] upon said last named sum from November 17, 1926, until paid.

WHEREFORE, Plaintiff prays judgment against the defendant for the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63), together with interest thereon at the rate of six per cent (6%) per annum from November 17, 1926, together with its costs of suit herein expended.

EDDY'S STEAM BAKERY, INC.,

By J. E. O'CONNELL,

Its President.

T. B. WEIR,

HARRY P. BENNETT,

Attorneys for Plaintiff.

Address: Helena, Montana. [6]

State of Montana,
County of Lewis and Clark.—ss.

J. E. O'Connell, being first duly sworn, deposes and says:

That he is an officer of Eddy's Steam Bakery, Inc., the corporation plaintiff making the foregoing complaint, to-wit, its President, and as such officer makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

J. E. O'CONNELL.

Subscribed and sworn to before me this 29th day of July, 1929.

(Notarial Seal)

HARRY P. BENNETT,
Notary Public for the State of Montana, Residing
at Helena, Montana.

My Commission expires September 26, 1931. [7]

EXHIBIT "A"

Form NP-2

Office of
Commissioner of Internal Revenue.

TREASURY DEPARTMENT
Washington.

IT:CA:2551-9-60D

Eddy Steam Bakery, Inc.,

Feb 9 1926

Formerly O'Connell and Gallavin Co.,

Helena, Montana.

Sirs:

The determination of your income tax liability for the years 1921 and 1922, pursuant to an examination of your books of account and records, discloses a deficiency in tax amounting to \$3,037.41 for 1921 and an overassessment amounting to \$219.71 for 1922, as shown by the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the

final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: CA:2551-9-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR

Inclosures:

Commissioner

Statements

Agreement - Form A By

Form 882

Assistant to the Commissioner.

caw-2

Form 7861—Revised May, 1925. 2-13281 [8]

STATEMENT.

IT:CA:2551-9-60D

In re: Eddy Steam Bakery, Inc.
Formerly O'Connell and Gallavin Co.,
Helena, Montana.

Year	Deficiency in Tax	Overassessment.
1921	\$3,037.41	
1922		\$219.71
	Net deficiency	\$2,817.70
	1921	
Net income disclosed		
by books		\$13,370.74
Add:		
1. Excessive depreciation		120.00
		<hr/>
Net income adjusted		\$13,490.74
1. The value of a lot at \$4,000.00 was included with depreciable assets, and depreciation computed thereon at 3%, which has been disallowed.		
Capital stock and surplus		\$48,792.68
Deduct:		
1. Federal income tax, 1920, (\$3,009.99 x .4226)	\$1,272.02	
2. Additional tax, 1918-1919	1,683.65	
3. Dividends paid	6,314.00	9,269.67
	<hr/>	<hr/>
Invested capital adjusted		\$39,523.01

1. Federal income tax for 1920 has been prorated from the date due and payable. (Article 845, Regulations 62)

2. Additional tax for prior years, outstanding at the beginning of the years, has been deducted. (Article 845, Regulations 62)

3. Dividends have been prorated in accordance with Article 858, Regulations 62, and deducted. [9]

Eddy Steam Bakery, Inc.	Statement.				
8% of invested capital					\$3,161.84
Exemption					3,000.00
					<hr/>
Excess profits credit					\$6,161.84
% of					
Capital	Net Income	Credit	Balance	Rate	Tax
20%	\$7,904.60	\$6,161.84	\$1,742.76	20%	\$ 348.55
Balance	5,586.14	—	5,586.14	40%	2,234.46
Totals	<u>\$13,490.74</u>	<u>\$6,161.84</u>	<u>\$7,328.90</u>		<u>\$2,583.01</u>

PROFITS TAX UNDER SECTION 302

Net income		\$13,490.74	
Exemption		3,000.00	
		<hr/>	
Balance taxable at 20%		\$10,490.74	
Total tax assessable			
at 20%			\$2,098.15
Net income		\$13,490.74	
Less:			
Profits tax	\$2,098.15		
Exemption	2,000.00	4,098.15	
	<hr/>	<hr/>	
Balance taxable			
at 10%		\$ 9,392.59	939.26
			<hr/>
Total tax assessable			\$3,037.41
Original tax			None
			<hr/>
Deficiency in tax			\$3,037.41

1922

Net income disclosed	
by books	\$14,134.08
Add:	
1. Donations	5.00
2. Federal income tax	257.21
3. Excessive depreciation	120.00
	<hr/>
Net income adjusted	\$14,516.29
[10]	

Eddy Steam Bakery, Inc. Statement.

1. Donations are not allowable deductions from net income. (Article 562, Regulations 62)

2. By a specific provision of the statute, Federal income tax is not an allowable deduction. (Section 234, Revenue Act of 1921.)

3. See explanation #1, net income for 1921.

Net income	\$14,516.29	
Exemption	2,000.00	
	<hr/>	
Balance taxable at 12½%	\$12,516.29	
Total tax assessable		\$1,564.54
Original tax		1,784.25
		<hr/>
Overassessment		\$ 219.71

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1921, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3708 to discuss your case before mailing formal notice of its determination as provided by Section 274(a) of the Revenue Act of 1924. It is necessary at this time, in order to protect the interests of the Government, either to

make an immediate assessment under the provisions of Section 274(d) of the Revenue Act of 1924 or to issue a formal notice of deficiency. Therefore the Bureau has elected to issue this notice of deficiency believing it will be more satisfactory than an immediate assessment.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with Section 281 of the Revenue Act of 1924.

The right of appeal as indicated on page 1 of this letter refers only to any deficiency in tax indicated herein inasmuch as there is no provision in the Revenue Act of 1924 granting the right of appeal against a determination of any overassessments found upon an audit of your returns.

Payment of the deficiency should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

caw-2 [11]

EXHIBIT "A" attached to and a part of Form 843 by Eddy's Steam Bakery, Inc., (Commissioner's Reference: IT:CA: 2551-9-60D).

State of Montana,
County of Lewis and Clark.—ss.

Hugh D. Galusha, being first duly sworn, deposes and says:

1. That at all times herein referred to, ever since said times and now, this claimant was and is a corporation organized and existing under the laws of the State of Montana, with its principal place of business located at the City of Helena, in the County of Lewis and Clark, State of Montana. That this claimant corporation was so organized under the laws of the State of Montana, February 21, 1918, with the corporate name O'Connell and Gallivan Company, and that thereafter and on July 9, 1923, pursuant to the laws of said State of Montana, this claimant's corporate name was changed to "Eddy's Steam Bakery, Inc.", by an amendment of the Articles of Incorporation duly made and filed as required by the laws of said last named State, and that ever since said last named date this claimant has been and now is doing business under the laws of the State of Montana, at the City of Helena, in Lewis and Clark County, Montana.

2. That C. A. Rasmusson is now, and ever since the 16th day of January, 1922, has been, a resident and citizen of the State of Montana and the duly appointed, qualified and acting Collector of Internal

Revenue for the District of Montana, residing at Helena, within the State of Montana.

3. That on or about February 9, 1926, the Commissioner of Internal Revenue, purporting to act under the provisions of the Act of Congress commonly referred to as the "Revenue Act of 1921", being the Act of Congress approved November 23, 1921, and particularly under [13] Sections 230 and 301 of Chapter 136 of said Act, and Acts of Congress amendatory thereof and supplemental thereto, did wrongfully and unlawfully levy and assess against this claimant income and excess profits taxes terms deficiency assessment as designated in said Act for the calendar year of 1921, in the sum of Three Thousand and Thirty-seven and 41/100 Dollars (\$3,037.41), as set forth in the letter of said Commissioner of date February 9, 1926, bearing said Commissioner's reference "IT:CA: 2551-9-60D", a true and exact copy of which letter is hereto attached, marked Exhibit "B", and by this reference made a part hereof.

4. That thereafter said Collector did demand of this Claimant said sum of Three Thousand and Thirty-seven and 41/100 Dollars (\$3,037.41), together with Seven Hundred and Eighty-two and 22/100 Dollars (\$782.22) interest thereon under said Acts of Congress, making a total demanded by said Collector of this Claimant of the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63) alleging the same to be due from this Claimant as such tax so levied by the Com-

missioner as aforesaid, and pursuant to said demand and by reason of the coercion incident to said assessment, demand and the administrative provisions of said Acts of Congress and the rules and regulations promulgated under said Act for the collection of taxes assessed thereunder, this Claimant did, on or about November 17, 1926, pay to said Collector, at Helena, in Lewis and Clark County, Montana, said sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63) under protest.

5. That prior to December 31, 1920, Claimant granted, sold, assigned, transferred and delivered to J. E. O'Connell of Helena, Montana, all of its property and business; that said alleged tax and the assess- [14] ment, and the whole thereof, is wrongful, unlawful and void, in this that, this Claimant transacted no business whatever during the calendar year 1921, or any part thereof, and that this Claimant neither received, nor earned, nor acquired, nor was entitled to any income or profits whatsoever for or during said calendar year 1921.

6. That said tax and the assessment thereof, and said interest thereon, was and is wholly unlawful and void.

7. That attached hereto, as Exhibit "C", is the duly executed Power of Attorney from Claimant to Hugh D. Galusha, which power and agency has never been revoked or terminated and is in full force and effect.

HUGH D. GALUSHA.

Sworn to and subscribed before me this 5th day of March, 1929.

(Seal)

L. H. WEST,

Notary Public for the State of Montana,
Residing at Helena, Montana.

My Commission expires April 20, 1930.

Received

Collector of Internal Revenue,
District of Montana.

Mar 6 1929

Helena Office. [15]

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS:

That Hugh D. Galusha of Helena, Montana, be, and he is hereby, made and constituted the true and lawful agent and attorney-in-fact for the undersigned Eddy's Steam Bakery, Inc., a Montana corporation, to, for it and in its name, place and stead, or in his own name, demand, collect, adjust, compromise, handle, manage and receipt for any and all claims and moneys due to the undersigned Eddy Steam Bakery, Inc., from the United States of America, and particularly to represent and act for the undersigned before the Treasury Department of the United States in all matters concerning or in connection with income taxes for the years 1921 and subsequent years. And said agent and attorney-in-fact, is hereby fully empowered to do all things in said premises as fully as the under-

signed might itself do, including the verification of any Bill of Complaint filed in any court for the recovery of any such taxes, and with power of substitution of another agent and attorney in his stead with the same powers as the agent herein named.

IN WITNESS WHEREOF, the undersigned Eddy's Steam Bakery, Inc., has caused its corporate name and seal to be hereunto affixed by its proper officers, hereto duly authorized, this 23rd day of February, 1929.

EDDY'S STEAM BAKERY, INC.

By J. E. O'CONNELL,

Its President.

Attest:

J. F. O'CONNELL,

Secretary.

Witnesses:

BESS WALSH

JENNIE TUFTE (Corporate Seal)

Received

Collector of Internal Revenue

District of Montana

Mar 6, 1929

Helena Office. [16]

EXHIBIT "C"

State of Montana,

County of Lewis and Clark.—ss.

On this 23rd day of February, A. D. 1929, before me L. H. West, a Notary Public for the State of

Montana, personally appeared J. E. O'Connell and J. F. O'Connell known to me to be respectively the President and Secretary of Eddy's Steam Bakery, Inc., the Montana corporation executing the foregoing instrument, and each for himself acknowledged to me that such corporation executed said instrument for the purposes therein stated; and I further certify that I read and fully explained said instrument and warrant of attorney to each of said affiants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this Certificate first above written.

(Seal)

L. H. WEST,

Notary Public for the State of Montana,
Residing at Helena, Montana.

My Commission expires Apr. 20, 1930.

Received

Collector of Internal Revenue,
District of Montana.

Mar 6 1929

Helena Office. [17]

EXHIBIT "D".

TREASURY DEPARTMENT

Washington

Jul 12 1929

Office of

Commissioner of Internal Revenue

IT:C:CC—

Eddy's Steam Bakery, Incorporated,

Formerly O'Connell & Gallivan Company,

Helena, Montana.

In re: Refund Claim for Year 1921

Amount \$3,037.41

Sirs:

Your claim for refund of taxes, above referred to, was disallowed by the Commissioner on a schedule dated July 12, 1929.

Respectfully,

C. B. ALLEN,

Deputy Commissioner.

By CHARLES P. SUMAN,

Head of Division.

[Endorsed]: Filed July 29, 1929. [18]

THEREAFTER, on the 20th day of January, 1930, the answer of the defendant to said complaint was duly filed herein, in the words and figures following, to-wit:

(Title of Court and Cause.)

ANSWER.

Comes now C. A. Rasmusson, the defendant herein, the duly appointed, qualified and acting Collector of Internal Revenue for the District of Montana, and for answer to plaintiff's complaint on file herein, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations of Paragraphs I, II, V, VI and VII thereof.

II.

Answering the allegations of paragraph III thereof, defendant admits that the Commissioner assessed against said plaintiff income and excess profits taxes for the calendar year 1921 in the amount of \$3,037.41 as set forth in plaintiff's Exhibit A, but states that said assessment was made on or about June 3, 1926, rather than February 9, 1926 as alleged by plaintiff; denies the levy and assessment of said tax was wrongfully or unlawfully made.

III.

Answering the allegations of Paragraph IV thereof, defendant denies that he demanded of plaintiff the sum of \$3,037.41 and alleges the fact to be that the demand was for \$2,817.70 together with interest of \$782.22, the said sum of \$3,037.41 having been reduced by crediting thereon an overpayment made by plaintiff of income taxes for the year 1922 in the amount of \$219.71, making a total of \$3,599.92 demanded by said defendant of the

plaintiff, which sum was paid by the plaintiff on or about November 19, 1926, rather than November 17, 1926, as alleged by the plaintiff but defendant denies that said payment was made by reason of any coercion incident to the assessment and demand of said tax. [19]

IV.

Defendant denies each and every allegation, matter and thing contained in Paragraphs VIII, IX and X thereof.

V.

Answering the allegations of Paragraph XI thereof, defendant admits that he has refused and still refuses to return or pay this plaintiff the amount of \$3,819.63; but denies he wrongfully and unlawfully holds and retains said \$3,819.63 or any other sum as the money and property of the plaintiff; and further denies that on said account there is due and owing from the defendant to the plaintiff the sum of \$3,819.63 with lawful interest thereon from November 17, 1926 or any other sum.

Denies each and every allegation, matter and thing not hereinbefore specifically admitted or denied.

WHEREFORE, having fully answered defendant prays that he be dismissed hence with his just costs herein incurred.

WELLINGTON D. RANKIN,

United States Attorney,

For the District of Montana.

ARTHUR P. ACHER,

Assistant United States Attorney

Attorneys for Defendant.

United States of America,
District of Montana.—ss.

Arthur P. Acher, being first duly sworn, deposes and says: that he is an Assistant United States Attorney for the District of Montana and one of the attorneys for the defendant herein; that as such makes this verification; that he has read the contents of the foregoing answer and that the same are true according to the best of his knowledge, information and belief.

ARTHUR P. ACHER.

Subscribed and sworn to before me this 20th day of January, 1930.

H. L. ALLEN,
Deputy Clerk,
(Seal) U. S. District Court.

[Endorsed]: Filed Jan 20-1930.

[20]

THEREAFTER, on July 16th, 1930, a stipulation in writing was duly filed in the above entitled cause in words and figures following:

(Title of Court and Cause.)

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto acting by and through their respective counsel:

That a jury may be waived and that the above-entitled cause may be tried to the court sitting without a jury.

T. B. WEIR,

Attorney for Complainant.

ARTHUR P. ACHER

Assistant United States Attorney
for the District of Montana.

Attorney for the Defendant.

[Endorsed]: Filed July 16, 1930

THEREAFTER, on June 16, 1931, a Bill of Exceptions in said cause was duly signed, settled and allowed in words and figures following:

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that this cause came on regularly for hearing before the Honorable George M. Bourquin in the above entitled Court on the 16th day of July, 1930, T. B. Weir and Harry P. Bennett appearing as Attorneys for the Plaintiff and Wellington D. Rankin, United States Attorney, and John R. Wheeler, Esquire, special Attorney, appearing for the defendant, and the parties hereto having entered into and filed herein their stipulation in writing that a Jury might be waived, and that the above entitled cause might be tried to the Court sitting without a Jury; Thereupon the following proceedings were had:

The COURT. Case on trial.

Mr. RANKIN. If the Court please: At this time I move the admission of John R. Wheeler, Special Representative of the Government.

The COURT. You mean, for this case? [21]

Mr. RANKIN. For this case.

The COURT. It may be done.

Mr. WEIR. If the Court please: This case No. 1399, Eddy's Steam Bakery, Incorporated, vs. C. A. Rasmussen, Collector. The action is against the Collector to recover approximately \$3800.00 in income taxes; that is, principal and interest in income taxes paid by the plaintiff here after the assessment levied by the Commissioner in 1926. The tax is for the year 1921. The only issue left in the case after the pleadings is the question of whether or not the corporation, plaintiff, conducted this business, or any business, in 1921, or, as the plaintiff contends, the business was conducted by the individual O'Connell.

I call the Court's attention to the title, Eddy's Steam Bakery. In 1920, 1921 and 1922 the name was O'Connell and Gallivan Company, the name having been changed in '23 or thereabouts. There is no question as to the amount, in taxes, so this amount is proper.

The COURT. Somebody did business, and it was charged up to this plaintiff.

Mr. WEIR. Somebody did business and it was charged up to this plaintiff, the income for the year in question.

The COURT. He paid the taxes?

Mr. WEIR. Yes, sir; paid the taxes.

The COURT. Wouldn't the tax be higher for the corporation.

The COURT. Than the individual?

Mr. WEIR. Yes, for this particular year; that is one of the chief motives in undertaking the change.

The COURT. I imagined there was something. Very well.

J. E. O'CONNELL being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

Direct Examination by Mr. WEIR.

My name is J. E. O'Connell. I have lived at Helena, Montana for twenty-two years. I am President of the plaintiff corporation, the Eddy Steam Bakery, Incorporated. I have been President of that Corporation since 1920. I am familiar with the affairs of this plaintiff corporation during, up to the end of 1921. The plaintiff corporation did not transact any business whatever in the year 1921. [22]

2. Did the plaintiff corporation have, or receive, or was it entitled to any income or profits for or in the year 1921?

Mr. WHEELER. Object to that as calling for the conclusion of the witness.

(Testimony of J. E. O'Connell.)

The COURT. It is a question on which you may enter fully on cross examination. It is overruled.

A. No, sir, prior to December 31st, 1920, the plaintiff corporation engaged in the Restaurant and Bakery Business in Helena, the restaurant was known as Eddy Restaurant, the Bakery was known as Eddy Steam Bakery here on Edwards Street.

Mr. E. H. Gallivan conducted the restaurant business during the year 1921. J. E. O'Connell conducted that bakery business during the year 1921. That is myself.

Mr. WEIR. You may take the witness.

The COURT. Cross examine.

Cross Examination by Mr. WHEELER.

I have lived in Helena 22 years and during all that time have been engaged in the bakery business since 1916. I went into partnership with Mr. Gallivan in 1910; we were in the Cafe business from 1910 to 1916, and in 1916 went into the bakery business also. In 1920, part of the year I was in the cafe and bakery business, both, for nine months in the cafe and bakery business; for three months only in the bakery business. The last three months of 1920, I was in the bakery business and was not in the restaurant business at that time. What happened was that Mr. Gallivan purchased the restaurant business; the restaurant. I sold to Mr. Gallivan, out of the Gallivan and O'Connell Com-

(Testimony of J. E. O'Connell.)

pany, and I continued to run the O'Connell and Gallivan Company for the rest of the year as a corporation in 1920. In 1921 I operated the Eddy Bakery as an individual by transfer of the assets of the Eddy Bakery, of the O'Connell and Gallivan Company to me as an individual, which was consummated by the act of the Board of Directors. A record was kept of the action of the Board of Directors. I have that record, a Minute Book. You may see it. (Book handed to Counsel by Mr. Weir.)

When this transfer was put through, I did not pay any money to the corporation. I own all the stock in the corporation. [23]

Q. Was any of the stock returned to the corporation?

A. I presume that it was.

Q. Do you know whether it was or not?

A. Well; it wouldn't matter whether it was returned or not.

Q. Will you answer the question, please?

A. Do I know? No, I don't know. In 1922 when the corporation repurchased this, I returned the assets to the corporation.

Q. And did you have your stock then?

A. I presume the stock was in the same condition it had been in in 1921.

Q. Has the stock ever been transferred to you since 1922?

A. I don't quite get your question. I do not hold the stock at this time. I let it go in 1928. I owned it up until 1928.

(Testimony of J. E. O'Connell.)

Q. Now, the corporation was alleged to have repurchased all those assets in January, 1922?

A. Yes, sir.

Q. Did the corporation owe you any money for the assets when it took them back?

A. No, sir.

Q. The sole purpose of this transfer as I take it from the record, was to lower the taxes of the corporation. Isn't that true?

A. To run the business at a lower cost.

Q. Yes. And it is a fact the taxes would be reduced because of the excess produced by the taxes of 1921?

A. Yes, sir.

Q. Well; it is a fact that you did want to get away from the higher taxes? Isn't it?

A. Why, certainly.

Q. And that was the purpose of the transfer, wasn't it?

A. That was the principal reason.

Mr. WHEELER. That's all.

Redirect Examination by Mr. WEIR.

Q. You stated that the restaurant was sold to Mr. Gallivan. Was it sold to Mr. Gallivan directly by the corporation, or did it go to someone else before Mr. Gallivan?

A. The restaurant was transferred to me and I sold it to Gallivan.

Q. That is, O'Connell and Gallivan Company transferred to you?

(Testimony of J. E. O'Connell.)

A. Yes, sir.

Q. Now, Minutes have been referred to here as the record of [24] these transfers. I ask you if you can identify this book which I hand you as the Minute Book of the O'Connell and Gallivan Company; pages 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25?

A. Yes, sir.

Mr. WEIR. We will offer those minutes.

Mr. RANKIN. No objection.

The COURT. Admitted. Go on.

Mr. WEIR. That's all. May we substitute copies of the book?

The COURT. Yes.

Witness excused.

The minutes of said corporation are in words and figures as follows: Pages 14-25 inclusive, [25]

MINUTES OF MEETING OF BOARD OF
DIRECTORS OF O'CONNELL &
GALLIVAN COMPANY.

A special meeting of the Board of Directors of the O'Connell & Gallivan Company, a corporation, was held at the office of the company at Helena, Montana, at 8 o'clock P. M. September 27, 1920.

There was present at said meeting directors J. E. O'Connell and J. F. O'Connell.

The meeting was called to order by director J. F. O'Connell, also vice-president of the company.

There was received and filed the resignation of director E. H. Gallivan as director of the company and as president thereof. Upon motion said resignation was accepted to take effect immediately.

Thereupon, director J. E. O'Connell moved that Eve O'Connell, a stockholder of this company be elected a director of said company, said motion was duly seconded and carried.

Thereupon by reason of a vacancy in the office of president of said company by the resignation of said E. H. Gallivan as president of said company, J. F. O'Connell nominated director J. E. O'Connell for the position of president of said company, and a vote being had said J. E. O'Connell was unanimously elected president of said company.

Thereupon; a vacancy existing in the office of secretary and treasurer of said company, director J. E. O'Connell nominated director Eve O'Connell for the position of secretary and treasurer of said company, and a vote being taken said Eve O'Connell was unanimously elected secretary and treasurer of said company.

Thereupon a discussion was had among said board about the compensation of officers of said company. Director J. F. O'Connell moved that the president of said company receive as compensation for his services in the management of said company the sum of \$7,500.00 per annum, until the further

action of this board, that the vice-president receive the sum of nothing per annum for his services in the employ and service of said company, and the secretary and treasurer receive the sum of \$ nothing per annum for his services in the employ and service of said company.

Thereupon director J. F. O'Connell moved that the restaurant heretofore owned and operated by this company which was and is known as the "Eddy Cafe" at Nos. 103 and 105 North Main Street, in the city of Helena, Montana, together with all and singular the furniture, fixtures, dishes, stock of foodstuffs, linens, tableware, and any and all other property of any kind, nature or character which has been and now is being used in the [26] conduct of that certain restaurant above mentioned, together with all bills owing to said company for bills run and credits extended in the operation of said restaurant business, such transfer and sale to take effect at the hour of midnight September 30th, 1920, and all receipts from said business up to that hour to belong to said company and all bills payable and expenses growing out of the management of said restaurant business to be paid by said company up to that hour, be sold to J. E. O'Connell of Helena, Montana, for the sum of \$..... and the officers of this corporation execute and deliver the necessary papers to effect said sale, which motion was duly seconded, and upon a vote being taken was unanimously carried.

There being no further business before the meeting the same was adjourned.

Dated September 27, 1920.

J. E. O'CONNELL,
President.

Attest: EVE O'CONNELL,
Secretary.

WE, the undersigned, directors of the O'Connell & Gallivan Company do hereby consent to the holding of a special directors meeting, minutes of which hereinbefore appear, without notice, hereby expressly waiving any and all notice of said meeting and confirming each and all the acts and things done and performed at said special directors meeting.

Dated September 27, 1920.

J. E. O'CONNELL,
J. F. O'CONNELL,
EVE O'CONNELL,
Directors. [27]

Helena, Montana, September 27, 1920.

The Board of Directors of
O'Connell & Gallivan Company,
Helena, Montana,

Gentlemen:

Herewith I tender my resignation as president and a member of the Board of Directors of your

Company, the O'Connell & Gallivan Company, the same to take effect immediately.

Very truly yours,

ED. H. GALLIVAN.

Accepted September 27, 1920.

J. F. O'CONNELL,

J. E. O'CONNELL,

Board of Directors O'Connell & Gallivan
Company. [28]

MINUTES OF MEETING OF BOARD OF
DIRECTORS OF O'CONNELL &
GALLIVAN COMPANY.

A special meeting of the Board of Directors of the O'Connell & Gallivan Company, a corporation, was held at the office of the Company, Helena, Montana, at 2 P. M. January 1st, 1921, pursuant to the following signed Waiver of Notice.

Helena, Montana, January 1, 1921.

We the undersigned being all of the Directors of the O'Connell & Gallivan Company, do hereby consent that a Special Meeting of the Board of Directors may be held at the Office of the Company, on January 1st, 1921, for the purpose of considering the sale of the Company's assets to Mr. J. E. O'Connell, and such other business as may come before the meeting with like force and effect, as if

due and regular notice, as required by law had been given.

J. E. O'CONNELL	748 shares
J. F. O'CONNELL	1 share
EVE O'CONNELL	1 share.

[29]

The meeting was called to order by the election of Mr. J. E. O'Connell as Chairman, Mr. J. F. O'Connell, Secretary.

Mr. J. F. O'Connell presented a proposal from Mr. J. E. O'Connell that he be allowed to purchase the assets, good will, trade name, etc., of the O'Connell & Gallivan Company, at book value as of date December 31st, 1920, and that he would assume any and all outstanding liabilities of the Company that existed at that time.

It was moved, seconded and carried that this proposal be accepted.

There being no further business before the meeting, meeting adjourned.

Dated January 1st, 1921.

J. E. O'CONNELL,

Chairman.

Attest: J. F. O'CONNELL,
Secretary. [30]

MINUTES OF THE MEETING OF THE
STOCKHOLDERS OF THE O'CONNELL
& GALLIVAN COMPANY.

A special meeting of the Stockholders of the O'Connell & Gallivan Company, a corporation, was held at the office of the Company, Helena, Montana, January 1st, 1921, at 3 P. M., pursuant to the following signed Waiver of Notice of meeting.

Helena, Mont. Jan. 1, 1921.

We the undersigned being all of the stockholders of the O'Connell & Gallivan Company, holding respective shares of stock set opposite our names, do hereby consent to the holding of a special meeting of the Stockholders for the purpose of considering the sale of the Company's assets to Mr. J. E. O'Connell, and such other business as may come before the meeting, and that such meeting may be held with like force and effect as if due and regular notice had been given.

J. E. O'CONNELL	748 shares
J. F. O'CONNELL	1 share
EVE O'CONNELL	1 share.

[31]

Meeting was called to order by the election of Mr. J. E. O'Connell as Chairman, Mr. J. F. O'Connell, Secretary.

Mr. J. F. O'Connell read the minutes of the meeting of the Board of Directors, held at 2 P. M. of this date.

It was moved and seconded that the action of the Board of Directors in disposing of the assets of the Corporation to Mr. J. E. O'Connell be confirmed.

There being no further business the meeting was adjourned.

J. E. O'CONNELL
Chairman

J. F. O'CONNELL
Secretary. [32]

MINUTES OF MEETING OF BOARD OF
DIRECTORS OF O'CONNELL &
GALLIVAN COMPANY

A Special Meeting of the Board of Directors of the O'Connell & Gallivan Company, was held at the office of the Company, at Helena, Montana at 2 P. M., January 2nd, 1922, pursuant to the following signed waiver of Notice.

Helena, Mont. Jan. 2, 1922.

We, the undersigned being all of the Directors of the O'Connell & Gallivan Company, do hereby consent that a Special Meeting of the Board of Directors may be held at the Office of the Company, on January 2nd, 1922, for the purpose of considering the purchase of the Assets of the Bakery owned and operated by J. E. O'Connell, and such other business as may come before the meeting, with like

force and effect, as if due and regular notice as required by law had been given.

J. E. O'CONNELL

J. F. O'CONNELL

EVE O'CONNELL. [33]

The meeting was called to order by the election of Mr. J. E. O'Connell as Chairman, and Mr. J. F. O'Connell as Secretary.

Mr. J. F. O'Connell presented a proposal from J. E. O'Connell in which Mr. J. E. O'Connell proposes to sell the Assets, Good Will, Trade Name, Etc., of the Bakery, operated by him, under the trade name of Eddy's Steam Bakery, at the book value as shown by his books, as of date Dec. 31, 1921, and that the Company should assume any and all outstanding liabilities of the said Bakery that existed at that time. Mr. O'Connell states that the total assets were \$55,564.99, and that the liabilities of the Bakery at that time were \$8,537.93, leaving a net worth of \$47,027.06.

It was moved, seconded and carried that this proposal be accepted.

There being no further business before the meeting the meeting adjourned.

Dated January 2nd, 1922.

J. E. O'CONNELL

Chairman

Attest: J. F. O'CONNELL

Secretary. [34]

MINUTES OF MEETING OF THE STOCK-
HOLDERS OF THE O'CONNELL &
GALLIVAN CO.

A Special meeting of the Stockholders of the O'Connell & Gallivan Company, was held at the Office of the Company, at Helena, Montana, at 3 P. M. January 2nd, 1922, pursuant to the following signed Waiver of Notice.

Helena, Mont. Jan. 2, 1922

We, the undersigned being all of the Stockholders of the O'Connell & Gallivan Company, do hereby consent that a Special Meeting of the Stockholders may be held at the Office of the Company, on January 2nd, 1922, for the purpose of considering the purchase of the Assets of the Bakery, owned and operated by J. E. O'Connell, and such other business as may come before the meeting, with like force and effect, as if due and regular notice as required by law had been given.

J. E. O'CONNELL 748 Shares

J. F. O'CONNELL 1 Share

EVE O'CONNELL 1 Share. [35]

The meeting was called to order by the election of Mr. J. E. O'Connell as Chairman and Mr. J. F. O'Connell as Secretary.

Mr. J. F. O'Connell read the minutes of the meeting of the Board of Directors, held at 2 P. M. of this date.

It was moved, seconded and carried, that the action of the Board of Directors in purchasing the

Assets of the Bakery, operated by J. E. O'Connell, under the trade name of Eddy's Steam Bakery, at the book value as of date Dec. 31, 1921 be confirmed.

There being no further business the meeting was adjourned.

J. E. O'CONNELL
Chairman

Attest:

J. F. O'CONNELL
Secretary. [36]

HUGH D. GALUSHA, being called as a witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination by Mr. WEIR.

My name is Hugh D. Galusha. I have lived in Helena, Montana, since 1914. My business is Certified Public Accountant. I am acquainted with the stock of this corporation, this plaintiff corporation. I know about the minutes and the meetings referred to in the minute book here on pages 18, 19, 20 and 21, those minutes were carried, written up and entered on that date.

Mr. WEIR. That is all.

Cross Examination by Mr. RANKIN.

Q. You were present there and got him to suspend this, with the plan of reducing the taxes, and you told Mr. Atwater that?

(Testimony of Hugh D. Galusha.)

A. Yes, I did.

Q. That is, you directed all the transfer made to Mr. O'Connell for the purpose of lowering the taxes?

A. Mr. O'Connell asked me what the rates were as an individual and what the rates were as a corporation.

Q. But the whole idea, in making this transfer, you had in mind making the transfer to lower the taxes?

A. I told him when he asked me, it would be a lot cheaper as an individual.

Q. To reduce the taxes?

A. Yes, sir.

Q. Did you explain it to Mr. Atwater?

A. Yes, sir.

Q. There was nothing of a money transaction, the company *company* or the individual have to pay anything?

A. No, sir.

Q. That was simply a paper transaction, I mean not an actual transfer, but a paper transaction?

A. Yes, I recall the circumstances; the stock was turned over to the corporation as security for the debt.

Q. The stock was turned over as security for the debt? [37]

A. Yes, sir.

Q. It was put up as security?

A. Yes, sir.

Q. For that, at that time?

(Testimony of Hugh D. Galusha.)

A. Yes, sir.

Q. But the debt was never paid.

A. The debt was carried on the stock ledger.

Q. Is there any record of that in the minutes?

A. Page 23 is the meeting approving the transfer, yes, 22 and 23.

Q. What was the date of this transfer?

A. It would be around about this date I presume.

Q. Is that on the date the property was sold, 1921?

A. When it was first made out.

Q. When was the first item of stock or anything else of the assets ever sold by Mr. O'Connell.

A. January, 1921.

Q. So far as the records show, what was paid for the assets, by Mr. O'Connell?

A. The record doesn't show.

Q. Doesn't show anything?

A. No.

Q. As a matter of fact, what was given?

A. The accounts receivable and the notes?

Q. A promissory note?

A. No, sir.

Q. What was it?

A. An open account.

Q. Interest or not?

A. Not any.

Q. Does the record show what was sold, the profits, or income?

(Testimony of Hugh D. Galusha.)

A. The records show the profits.

Q. What was that?

A. It says at book value December 31, 1920.

Q. What was the book value?

A. The record as shown by O'Connell and Gallivan Company December 31, 1920. [38]

Q. The valuation was ascertained?

A. Yes, sir.

Q. The record of that is not here. The record shows it was just transferred, not cancelled?

A. At the close of 1921?

Q. Yes.

A. Yes, sir.

Q. The assets were never distributed to the stockholders no distribution made to the stockholders for the sale of this property to O'Connell, the corporate sale of assets to O'Connell?

A. Yes, sir, he was the only stockholder.

Q. He can't be the only stockholder.

A. Two qualifying stockholders.

Q. All right. Anything done with this property, anything distributed to the stockholders?

A. Which property do you mean?

Q. Anything given to the stockholders, any dissolution?

A. No, sir.

Q. What became of the company, did it proceed or not?

A. Yes, sir.

(Testimony of Hugh D. Galusha.)

Q. Did you find later that the assets of both the O'Connell-Gallivan Company, both O'Connell and the company were transferred?

A. Yes, sir.

Q. And this business has a member accountant?

A. Yes, sir.

Q. A certified public accountant?

A. Yes, sir.

Q. For how many years had you been accountant of this corporation, in all, altogether how many years?

A. Probably since 1918 or 1919.

Q. And you had also looked after the personal accounts, money, and the money for the income taxes for both the company and the individual?

A. Yes, sir. [39]

Q. Was there a bill of sale of the personal property?

A. Nothing I know of.

Q. Any real estate transferred?

A. The corporation didn't own any real estate.

Q. Didn't own any at all?

A. No, sir.

Q. No deeds given by the corporation to Eddy O'Connell?

A. I can explain that if you wish.

Q. All right.

A. The building in which this business is conducted had been purchased from Stadler and Kaufman, under a contract of sale; that contract of sale

(Testimony of Hugh D. Galusha.)

was to J. E. O'Connell personally and had always been so.

Q. Would you say the corporation included this real estate in this company's assets on this date, December 31, 1921?

A. Yes, although they didn't have the legal title.

Q. Well, wasn't that in the total assets, one was the real estate, the building of the company but carried in Eddy O'Connell's name?

A. That I am not qualified to say.

Q. Well, you prepared this statement?

A. I prepared this statement; we got that over there.

Q. All right. You show real estate of the company on December, 31——

The COURT. What did you say?

Q. December 31. That balance sheet was made by you for the Eddy Bakery?

The COURT. A Tax statement?

Mr. RANKIN. No, a sheet. You put the valuation at \$15,192.94?

A. Yes.

Q. Was that building in here?

A. Yes, sir.

Q. And no deed or transfer, any kind of transfer to Eddy O'Connell was that made from the Steam Bakery to Eddy O'Connell? [40]

A. I think they were, yes, sir.

(Testimony of Hugh D. Galusha.)

Q. Any written evidence of any transfer from the Eddy Steam Bakery of this building, to Eddy O'Connell personally?

A. Nothing I know of. Not to my recollection; nothing. There was the contract from Stadler and Kaufman to J. E. O'Connell.

Q. And J. E. O'Connell was holding that for the plaintiff?

Mr. WEIR. Just a moment. To which we object as calling for a conclusion of law.

Q. What is that—that the company owned the building, the corporation?

Mr. WEIR. Just a moment, the witness hasn't stated the company owned the building.

The COURT. Yes.

Q. The company owned the actual title of the building; it belonged to the company on that day it was transferred to O'Connell personally, December 31, 1921, didn't it; to the Eddy Steam Bakery, not to him personally, even though carried in his name?

A. I presume so.

Q. And I will ask you if that—everything in that building was all of the value of \$50,000.00?

A. Yes, I should think so.

Q. Do you remember the purchase price?

A. No.

Q. How about the value put on the land and the interest?

(Testimony of Hugh D. Galusha.)

A. \$16,494.00.

Q. How much was due to the owners of the real estate to make the legal title?

A. This title to the building? \$4,000.00.

Q. Is that from the balance due on the building?

A. Yes, sir.

Q. Now, that statement of December 31, 1920, is to the same effect as to the land on that date; the building \$15,313.70. In other words, that same condition obtained December 31, with the exception of the full deed?

A. Yes, sir.

Q. That is all.

The COURT. Any redirect? [41]

Redirect Examination by Mr. WEIR.

Q. Mr. Galusha, you have referred to a formal contract between Stadler and Kaufman and J. E. O'Connell. I show you a document dated May 7, 1923, and ask you if that is the document.

A. The document I have in mind was the contract of purchase.

Q. I show you another document dated April 25, 1917, and ask you if that is the document to which you refer.

A. Yes, sir.

Q. Can I have the reporter mark it for identification?

(Exhibits were here marked defendant's two and three.)

(Testimony of Hugh D. Galusha.)

Q. The reporter having marked the deed exhibit 3, I will ask you if that deed is the deed testified to from the exhibit one?

A. Yes, sir.

Mr. WEIR. We offer first the contract, Exhibit 2 and then the deed, exhibit 3.

Mr. RANKIN. No objection.

The COURT. What are those exhibits.

Mr. WEIR. They are the contracts in writing for the purchase of this building. This is the deed.

The COURT. Call the next witness.

Mr. WEIR. The plaintiff rests.

Thereupon, the defendant moved for judgment in its favor and against the plaintiff upon the ground that the evidence was insufficient to support judgment for the plaintiff, Motion denied by the Court and exception of the defendant noted.

The COURT. For the defendant.

A. B. ATWATER, being called as a witness for and on behalf of the defendant was duly sworn and testified as follows:

Direct Examination by Mr. RANKIN.

My name is A. B. Atwater. I am Internal Revenue Collector. I have been such 15 years, and am still such. I checked up this income and made an income tax adjustment.

(Testimony of A. B. Atwater.)

Q. You talked with O'Connell and Galusha?

A. To some extent.

Q. At the time he made this transfer to lower the income taxes? [42]

A. I talked to Galusha in 1920.

Q. You know what place was valued at, to make a fair basis?

Mr. WEIR. Just a moment, if that is to impeach our witness, we want to know when and where.

The COURT. Well, let me see. What is this public accountant's name?

Mr. WEIR. Galusha.

The COURT. Oh, yes. Well, evidently, as far as O'Connell is concerned, it may be proper. Another time this is stated in the contract; it is simply what he offered to pay.

Q. Did you ever talk to O'Connell about that?

A. I talked to O'Connell about his taxes, yes; I was making an investigation.

(Exhibit marked for identification Defendant's Exhibit 4)

Mr. RANKIN. We offer in evidence defendant's exhibit 4 and ask you what that is briefly, if that is the claim for refund?

A. That is the tax claim for refund: yes, sir. It is a certified copy.

Mr. RANKIN. A photostatic copy.

Mr. WEIR. That is the same claim filed in the complaint?

(Testimony of A. B. Atwater.)

Mr. WHEELER. It was filed in 1929.

Mr. WEIR. May I ask: Do you know whether that is the same claim filed with the complaint?

Mr. WHEELER. Yes.

Mr. WEIR. If it is the same as filed with the complaint, it is in evidence.

Mr. RANKIN. It is not in evidence because of the filing of the complaint.

Q. (Mr. Rankin) I will ask you whether or not Mr. Galusha appeared as attorney in fact, with a power of attorney?

Mr. WEIR. Just a moment. The document speaks for itself, without the interpretation of the witness.

The COURT. State the facts and we won't make a point on it right now.

Q. I just wanted to call the court's attention to it.

(Exhibits marked for identification Defendant's exhibits five to ten). [43]

Q. I show you this exhibit five. What is it; whose income tax return is that?

A. That is the individual income tax return of J. E. O'Connell, for 1920.

Mr. RANKIN. We offer in evidence the photo-static copy.

The COURT. What is the purpose?

Mr. RANKIN. Well, to show the claims of the corporation and the individual; and the real estate of the corporation, no transfer; to show that the

(Testimony of A. B. Atwater.)

income tax returns of both the individual and the company and to show it is actually of the company.

Mr. WEIR. If the court please, we object to defendant's exhibit five upon the ground that it is not material, but relates to another matter. This is J. E. O'Connell's return for 1920.

The COURT. It seems very material for the defendant. Overruled.

Exhibit No. 5 is the individual income tax return for 1920 filed by J. E. O'Connell, Helena, Montana, which shows income of J. E. O'Connell as manager O'Connell & Gallivan Co., Helena, \$7500.

Q. Defendant's exhibit 6 is the individual income tax return for who?

A. J. E. O'Connell for 1921.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. That is the year in question.

The COURT. All those things are admitted. I can't see any necessity for all this.

Exhibit 6 is the individual income tax return for 1921 filed by J. E. O'Connell, Helena, Montana by this reference made a part thereof.

Mr. WEIR. No objection to exhibit six.

Q. Defendant's exhibit seven; what is it, briefly?

A. J. E. O'Connell's individual return for 1922.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. The same objection as offered to defendant's exhibit five.

The COURT. What is the reason for it; to show he didn't pay taxes on the bakery? [44]

(Testimony of A. B. Atwater.)

Mr. RANKIN. Well, it is to show the corporate transfer; that, as a matter of fact, this was of the company and not the individual; the individual was not benefited by the transfer.

The COURT. It is admitted that the company transferred to him in 1921 and back to the company in 1922. Well, I think it is material to the stock record. The objection will be overruled.

Exhibit No. 7 is the individual income tax return for 1922 filed by J. E. O'Connell, Helena, Montana, showing salary received from O'Connell & Gallivan Co., Helena, Montana, \$7500.

Mr. WEIR. Exception.

Q. Exhibit eight?

A. The O'Connell-Gallivan corporation return for 1920.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. If the court please, there is a batch of letters here.

Mr. RANKIN. We have no desire to put the letters in.

Mr. WHEELER. This is just as the return is received in the office.

Mr. WEIR. The plaintiff objects to defendant's offered exhibit, Number eight, on the ground that it is irrelevant to any issue in the case. It is apparently the income tax return for the O'Connell-Gallivan Company for the year 1920.

The COURT. It is proof of the income in the record. Likewise overruled.

(Testimony of A. B. Atwater.)

Exhibit 8 is the Corporation Income and Profits tax return for 1920 filed by O'Connell-Gallivan Company, Incorporated, Helena, Montana, by this reference made a part hereof.

Mr. WEIR. Exception.

Q. Defendant's exhibit 9; do you know, state briefly whether this is the income tax return for 1921 for the O'Connell-Gallivan Company?

A. The O'Connell-Gallivan Company corporation return for the year 1921.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. No objection. [45]

The COURT. Admitted.

Exhibit 9 is the Corporation income and profits tax return for 1921, filed by O'Connell & Gallivan Company, Helena, Montana, reporting "No income or expense" by this reference made a part hereof.

Q. I show you defendant's exhibit 10 and ask you if this is the corporation return of the O'Connell-Gallivan Company for the year 1922.

A. The O'Connell-Gallivan Company corporation return for the year 1922.

Q. On internal revenue?

A. Yes.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. We object to it.

The COURT. Same ruling.

Mr. WEIR. Exception.

Exhibit 10 is the Corporation income tax return for 1922 filed by O'Connell & Gallivan Co., Helena, Montana, by this reference made a part hereof.

(Testimony of A. B. Atwater.)

Q. Now, you took this up with Mr. O'Connell over a period of some months did you, the matter of this income tax dispute?

A. Oh, no. I was in his office one time and we talked about it, thoroughly, however. I had made the investigation in a friendly way.

Q. Now, I will ask you whether anything was turned over to the company——

Mr. WEIR. Just a moment.

Q. ——Whether Mr. O'Connell told you of anything that was turned over to the company for the assets that were turned over by the company to Mr. O'Connell.

A. I will have to explain.

Q. All right explain briefly.

A. I told Mr. O'Connell that in my opinion that the stock should have been transferred to the company in payment for the assets.

Mr. WEIR. Just a moment; what assets.

A. The assets of the Eddy Bakery. [46]

Q. One moment. I don't want to get involved. I want to ask you whether Mr. O'Connell made any statement to you as to whether or not anything was turned over to the company by him for the assets that he claimed were transferred to him personally by the company.

A. Well, he admitted that he was—I wanted to——

Q. I know. All I want to know about; I want to know what he said.

(Testimony of A. B. Atwater.)

A. Well, he said he didn't believe the case should be lost because of the fact that the stock had not been transferred.

Q. Let me ask you if he said he transferred anything to the company for the assets turned over to him?

A. No, I don't know whether he did or not.

Q. Did you ask him?

A. No, it was a friendly conversation.

Q. Do you know then, whether he transferred anything; did you ever ask him about it?

A. No. As I understand, there never was any transfer.

Q. Did he admit to you there wasn't any transfer.

A. He admitted in that talk there wasn't any deed or transfer.

Q. Did you ask him whether there was any deed or bill of sale or anything of that kind of the property of the company to him?

A. I don't recall him saying anything like that.

Q. As far as you could ascertain from talking to him in the office of the company, there wasn't any transfer?

A. As I understood, there wasn't any transfer or bill of sale.

Q. From the talk with him?

A. Yes, sir, and I embodied that in my reports.

Mr. RANKIN. That's all.

(Testimony of A. B. Atwater.)

Cross Examination by Mr. WEIR.

Q. Mr. Atwater, you spoke of transfers. You say Mr. O'Connell admitted that there was no transfer—transfer of what?

A. Of the capital stock that he owned in the corporation, the Eddy Gallivan Company, a corporation, the capital stock of the corporation which he owned. [47]

Q. You don't mean to say, as I understand you, that Mr. O'Connell admitted that there wasn't any transfer of the assets of this corporation, did you?

A. No, not to him, but he admitted there was no transfer of the capital stock by him to the corporation in payment of the transfer.

Q. You say there was nothing to show what were transferred; there was a transfer of the certificates of the capital stock, or any assets of the corporation?

A. Yes.

Q. You refer to assets of the Eddy Bakery. Was there any difference in the status of the bakery and the restaurant?

A. The Eddy Bakery and the Eddy Cafe or Restaurant all belonged to the corporation; they were all a part of the assets of the corporation in 1921.

Q. Did you include the Cafe business in the taxes of 1921?

A. No.

Q. Why?

(Testimony of A. B. Atwater.)

A. Because the cafe had been sold to E. H. Gallivan.

Q. And the sale—was there any bill of sale?

A. No, but he surrendered all his stock.

Q. Was there any bill of sale?

A. I don't know.

Q. Was there any deed?

A. I don't know.

Q. I show you what purports to be the stock book of the O'Connell Gallivan Company, with reference to the Stock of Gallivan. That was the certificate upon which you base your statement.

A. Well, there is one certificate, No. 5, to E. H. Gallivan for 249 shares; and then earlier, there was one share of the stock which is attached to the stub.

Q. The entry is in the book I show you, E. H. Gallivan?

A. Yes, September 27.

Q. September 27, 1920. Isn't that the same status, the status of the rest of the stock that Mr. O'Connell owned, so far as the book is concerned?

A. What stock do you refer to?

Q. All in the name of J. E. O'Connell and J. F. O'Connell. [48]

A. No. 1 is in the name of J. E. O'Connell, but it hasn't any endorsement on it.

Q. Pasted in the book?

A. Yes, pasted in the book but hasn't any endorsement on it. No. 2 is E. H. Gallivan for one

(Testimony of A. B. Atwater.)

share and this has the endorsement on the back dated September 27, 1920.

Q. Now—there wasn't—that is, so far as you know, anything you were able to discover wouldn't make any difference in the status of the Gallivan stock and the O'Connell stock was there, or was there?

Mr. RANKIN. It is immaterial.

The COURT. I think that is correct; objection sustained.

Mr. WEIR. Exception.

Q. Mr. Atwater, so far as you know, was there any difference in the status of the assets of the bakery and the restaurant, so far as their being concerned, *being concerned*, being taxable in this corporation?

Mr. RANKIN. Object to it on the ground it is immaterial.

The COURT. Objection sustained.

Mr. WEIR. Exception.

The COURT. Anything further with the witness?

Q. Mr. Atwater, you have had access to this stock book right from the beginning of your cross examination, have you?

A. Yes, sir.

Redirect Examination by Mr. RANKIN.

Q. Was there any dissolution of the company?

Mr. WEIR. Just a moment, that isn't proper.

(Testimony of A. B. Atwater.)

Mr. RANKIN. You asked him if there was any dissolution of the company, any transfer of the stock.

The COURT. That is already testified to by a prior witness who is still president of the company.

Mr. RANKIN. That is all. The government rests.

Mr. WEIR. If the court please, there is one question. I should have asked Mr. O'Connell on direct. May I call him back?

Mr. RANKIN. No objection.

The COURT. Very well. [49]

J. E. O'CONNELL, Recalled.

By Mr. WEIR:

Q. Was there any change in the method of doing business so far as changing the billing to the public was concerned in 1921 or 1920?

A. Yes, sir.

Q. How as to your billheads?

A. My billheads carried the name of J. E. O'Connell.

Q. When.

A. January of 1921.

Q. And all during the year 1921?

A. And all during the year 1921.

Q. What was there? J. E. O'Connell, I think it was?

(Testimony of J. E. O'Connell.)

A. Yes.

Q. And how, prior to 1921—1920?

A. O'Connell and Gallivan, incorporated.

Q. Was it on the billheads?

A. Yes, sir.

Q. How about your contracts?

A. Purchases were made in the name of J. E. O'Connell; our taxes were paid in the name of J. E. O'Connell.

Q. That is in 1921?

A. In 1921. The Public was advised by me of the change—the only thing we knew how to do to inform the people because of the sale; that we were operating as an individual.

Q. And this J. F. O'Connell referred to here?

A. Is my brother.

Q. And Eve O'Connell?

A. My wife.

Cross Examination by Mr. RANKIN.

Q. The purpose of it was to show Eddy Gallivan was out, was it?

A. No, sir.

Q. Had nothing to do with it?

A. No, sir.

Q. I just understand you to say you did everything you could to show the public he was not in it.

[50]

A. Not that he wasn't in on it; I didn't say that.

Q. What did you say?

A. I said I was operating as an individual.

(Testimony of J. E. O'Connell.)

Q. Did you want to show the public Eddy Gallivan wasn't in it any more?

A. I think the public, everybody knew it.

Q. Didn't you sign Eddy Steam Bakery, and just your name under it?

A. Our business always operated under the trade name of Eddy Bakery.

Q. You put Eddy Steam Bakery on it?

A. If we rendered a bill we wouldn't render it J. E. O'Connell because of purchases made in the trade name. We operated for years under the name of Eddy Steam Bakery or Eddy Cafe. If I sent a bill out on the first of January, J. E. O'Connell, some people wouldn't know from whom they purchased. It was to show them the ownership.

(Exhibits 11 and 12 marked for the defendant)

Q. I show you proposed exhibits 11 and 12. Exhibit No. 11 refers to the J. E. O'Connell under the Eddy Steam Bakery.

A. Under the Eddy Steam Bakery. I would say those billheads were used in 1921.

Q. And Exhibit 12 is billheads used in 1921?

A. Yes, sir.

Mr. RANKIN. We offer these billheads in evidence. No objection, I take it?

Mr. WEIR. No objection.

Q. When did you have the Eddy Gallivan sale?

A. September 1920.

Q. Any difference in the way you conducted this business during the years?

A. No, sir.

(Testimony of J. E. O'Connell.)

Q. The business went on just the same except in the way you conducted it in the name of a corporation or individual?

A. We tried to do it, yes. [51]

Q. You were manager at all times for the company and as an individual?

A. Mr. Gallivan was President up to 1920.

Q. But didn't you, as a matter of fact, manage the bakery, and he the restaurant?

A. Yes.

Q. You have always been manager of the bakery?

A. Yes.

Q. There is no change in that?

A. No, sir.

The COURT. Anything further?

Mr. RANKIN. Nothing further.

Redirect Examination by Mr. WEIR.

Q. Mr. O'Connell, when did the restaurant go out of this company?

A. September 1920.

Q. And how did it go out, by what method?

A. By resolution of the Board of Directors selling the assets of the Eddy Cafe to me and by me paying a bonus to Mr. Gallivan for his stock in the O'Connell Gallivan Company.

Q. Was there any dissolution, or anything?

A. No, sir.

Q. In other words, wasn't the restaurant handled just as the bakery?

A. Yes, sir.

Mr. RANKIN. One moment——

Mr. WEIR. That's all.

(Testimony of J. E. O'Connell.)

Recross Examination by Mr. RANKIN.

Q. But this transfer had nothing to do with Eddy Gallivan; this was a separate and distinct transaction? In other words this had nothing to do with the bakery?

A. No.

Witness excused. [52]

Exhibit 11 follows:

In Account with
EDDY'S STEAM BAKERY
J. E. O'CONNELL

Phone 658

18 Edwards Street Helena, Montana.....192.....

Date	Articles
	To Balance
	To Merchandise

Exhibit 12 follows:

In Account with
EDDY'S STEAM BAKERY
O'Connell & Gallivan Co., Inc.

18 Edwards Street

Phone 658

Helena, Montana.....192.....

All bills are due weekly.

Date	Food Administrators License No. B 16111
	Articles To Balance
	To Merchandise.

That thereupon, the said cause was submitted to the Court for decision.

That, thereafter, briefs were submitted to the Court, and on February 5, 1931, the Court entered its decision herein ordering judgment in favor of the Plaintiff and against the defendant in words and figures as follows, to-wit:

(Title of Court and Cause.)

DECISION

Plaintiff sues the Collector to recover Federal income taxes exacted.

The evidence is that January 1, 1921, O'Connell & Gallivan, a Corporation, then and for some time had owned and operated Eddy's Steam Bakery. O'Connell owned all the stock save qualifying shares. Income taxes greater upon corporations than upon individuals, O'Connell and his "attorney" Galusha, in the words of a noted character of the day, "skum a skeme", the bakery to be transferred to and operated by O'Connell. Accordingly, the day last aforesaid [53] a special meeting of the corporate directors accepted O'Connell's proposal to buy all corporate assets, including trade name and good will, at book value, and a like meeting of all stockholders confirmed the transaction. There were no documents of transfer, no money paid, no note executed, no transfer of stock, though Galusha testifies the stock was pledged to the corporation to secure the debt but of which O'Connell professes ignorance and is no record.

O'Connell testifies that during 1921 he individually operated the bakery as before he had for the corporation, but bill heads were changed by substituting his name for O'Connell & Gallivan beneath the trade name "Eddy's Steam Bakery, purchases were made in his name and taxes likewise paid, the corporation transacted no business, was entitled to no profits and received none, and that the chief purpose was to "get away from the higher taxes". For 1921 the corporation made return it was inactive, without income or expense, and O'Connell in his return included the operations of the bakery. The result was to diminish taxes some \$2000.00.

The Revenue Act of 1921 diminished the spread between corporation and individual taxes, and January 2, 1922 the corporate directors accepted another proposal from O'Connell that it repurchase the assets aforesaid at book value. Again, were no documents, no money paid, and O'Connell "presumes the stock was in the same condition as in 1921"; but Galusha testifies the debt was cancelled and the stock returned, though again, no record thereof. Thereafter, the corporation operated the bakery and in 1923 substituted the latter's name for its own. In 1926 the Commissioner assessed against the corporation some \$3000.00 income taxes for 1921, which the corporation paid, and this action followed.

Taxes, revenues are the life-blood of states, without which they perish. Reasonable, equal and for legitimate objects of government, they are an obligation comparatively light and in the main more or less cheerfully paid.

Unhappily, however, legislatures, controlling revenues and public funds, are the persistently hunted prey of greedy and unscrupulous blocs who clamor (1) for questionable appropriations of public money for a great variety of quasi doles and state [54] socialistic schemes pauperizing the spirit, and (2) for relief from taxes by shift of the burden to others. "Where the carcass is are the vultures gathered together", and there too does the "tax expert", magician, witch doctor or hexer find good hunting in a fertile field.

Too often legislators over amiable or sensitive to the source and precariousness of official tenure, and spending other people's money or taxing other's property, ignore the pole star of Constitutions that all taxation shall be reasonable, equal and for public purposes, and fall easy victims to these tireless lobbies. The inevitable result is irregular and wasteful appropriations, unreasonable and unequal taxation, intolerable burdens threatening the very existence of private property and government, taxes too often sullenly paid only when they can not be evaded. Hence, though evasion of taxes is a fraud upon Society, the prevalent moral code little frowns upon it and attaches slight if any turpitude thereto. It is of course true that an owner lawfully may and many do abandon or sell property to escape taxes. To be lawful, however, the sale must be real and not sham, permanent and not temporary, in good faith to transfer the property and not merely to

pass title to evade taxes, that accomplished, title to be restored. Substance and not form, intent and not declarations give color to and determine the character of the transaction when in issue. The law looks quite through all camouflage to discover what lies behind.

See *Shotwell vs. Moore*, 129 U. S. 596;
37 Cyc. 770 and cases.

With these principles in mind, it is obvious that the transaction between the corporation and O'Connell was fictitious in so far as transfer of the former's assets to the latter is concerned, and had it been to defeat taxes upon the property itself, would have been illegal and ineffective. But that is not this case; not taxes upon *property* but taxes upon *persons* based on *income* alone are involved.

If the corporation had no income, the law imposed no taxes, however much property it owned; and that, whether lack of income was due to poor management, poor business, poor patronage or no collections, or inaction or suspension of business. Moreover, no taxes even though the corporation improvidently gave to another the right to operate its instrumentalities, conduct the business, and take and enjoy the profits.

That is the instant case. Fictitious though the transaction was, it would prevail against all save corporate creditors. [55]

To avoid corporate taxes, the intent of the scheme was to directly vest in O'Connell the income which

otherwise would directly vest in the corporation and indirectly in O'Connell as sole stockholder, if any dividends.

The corporation relieved of all labor and responsibility to perpetuate the business, trade name and good will, was likewise of income. O'Connell assumed the first, to secure the last.

Although the intent of the transaction was a sham transfer of title to the property, it was also to really vest O'Connell with all income accruing from his use of the property, thereafter both intents equally executed. The case is as simple as that of John Jones who that year permitted his son Sam to farm his father's land and take the profits. However large the latter, clearly no taxes were due from John. With that case, this is all-fours, even though confused by a disingenuous scheme.

The corporation thus having no income in 1921, the taxes assessed were illegal, and plaintiff is entitled to recover as it prays. Judgment accordingly.

February 5, 1931.

BOURQUIN,
Judge.

THAT THEREAFTER, on February 9, 1931, the Court ordered that said defendant be given 30 days in all within which to prepare and serve his proposed bill of exceptions herein.

And now within the time allowed by law and the Order of the Court the defendant lodges the fore-

going proposed bill of exceptions and asks that the same be signed, settled and allowed.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Defendant.

Service of foregoing bill of exceptions and receipt of copy admitted this 7th day of March, 1931.

Proposed Bill lodged March 7, 1931. [56]

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

It is hereby stipulated and agreed between the parties hereto that the foregoing may be signed, settled and allowed as and for a bill of exceptions herein.

Dated this 2nd day of June, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorney for Defendant.

CERTIFICATE OF JUDGE.

I, George M. Bourquin, Judge of the above entitled Court, and the Judge before whom said cause was tried, hereby certify that the foregoing is a true and correct bill of exceptions, and that the same contains all the testimony given at the trial of said cause and that the foregoing is now by me hereby settled, allowed and approved as a true bill of exceptions in said cause.

Dated this 16th day of June, 1931.

BOURQUIN,
Judge.

[Endorsed]: Filed June 16, 1931.

THEREAFTER, on February 11, 1931, a petition was filed herein in words and figures as follows:

(Title of Court and Cause.)

PETITION.

Come now the parties plaintiff and defendant herein, by their respective counsel, and move the Court to make special finding and certificate herein pursuant to Section 842 of Title 28 of the United States Codes, upon the question of whether or not there was probable cause for the defendant Collector herein demanding and collecting the tax complained of in the complaint, or whether or not he acted under the directions of the Secretary [57] of the Treasury or other proper officer of the Govern-

ment in committing the act and acts complained of in the complaint.

Dated February 10th, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed February 11, 1931.

THEREAFTER, on February 11th, 1931, a Certificate and Special Finding was duly signed and filed herein in words and figures following:

(Title of Court and Cause.)

SPECIAL FINDING AND CERTIFICATE.

Upon application of the parties plaintiff and defendant herein, by their respective counsel, for special finding upon the question of whether or not there was probably cause for the act and acts of the defendant Collector complained of in the complaint, or whether or not the defendant Collector in performing the acts complained of in the complaint acted under the directions of the Secretary of the Treasury or other proper officer of the Government as referred to in Section 842 of Title 28 of the United States Code, the Court finds, that the defendant Collector in demanding and collecting of the

plaintiff the tax complained of in the complaint acted under the directions of the Commissioner of Internal Revenue, and that therefore there was probable cause for said act done by the Collector and complained of in the complaint.

Dated February 11th, 1931.

BOURQUIN,
Judge.

[Endorsed]. Filed February 11th, 1931. [58]

THEREAFTER, on February 11th, 1931, a Judgment was duly entered herein in words and figures as follows:

(Title of Court and Cause.)

JUDGMENT.

This cause came on for hearing on the merits on the 16th day of July, 1930, before the Honorable George M. Bourquin, pursuant to a stipulation of the parties in writing waiving a jury, under Section 773 of Title 28 of the United States Code, and legal evidence free of objection being submitted, and the cause being submitted to the Court and taken under advisement, and the Court thereafter on the 5th day of February, 1931, having made and filed herein its opinion and findings in favor of plaintiff and against defendant, and directing judgment as prayed in the complaint, and the Court having thereafter on the 11th day of February, 1931, at the request of the parties by their counsel in open

Court made herein its special finding, viz; that the defendant Collector in demanding and collecting the tax in question from the plaintiff acted under the directions of the Commissioner of Internal Revenue.

Now, Therefore, it is hereby ORDERED, ADJUDGED and DECREED, that the plaintiff do have and recover of the defendant the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars (\$3,819.63), together with interest thereon at the rate of six per cent per annum from the 19th day of November, 1926, to a date preceding the date of payment by not more than thirty days, with costs of suit taxed at \$.....

Judgment entered this 11th day of February, 1931.

C. R. GARLOW,

Clerk, U. S. District Court,

By H. H. WALKER,

Deputy. [59]

THEREAFTER, on February 14th, 1931, Notice of entry of Judgment was duly served and filed in words and figures following:

(Title of Court and Cause.)

NOTICE OF ENTRY OF JUDGMENT

To the Defendant above named, and to Wellington D. Rankin and Arthur P. Acher, his Attorneys:

You, and each of you, will please take notice that in the above entitled cause the Court on the 5th

day of February, 1931, rendered and filed herein its opinion, and that on the 11th day of February, 1931, judgment was entered herein in favor of the plaintiff and against the defendant.

Dated February 14, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

Due personal service of within notice of entry of Judgment made and admitted and receipt of copy acknowledged this 14th day of February, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 14, 1931.

THEREAFTER, on May 9th, 1931, the Assignment of Errors of the defendant and appellant was duly filed herein in words and figures as follows, to-wit:

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, the defendant in the above entitled cause, and files the following assignment of errors upon which he will

rely in the prosecution of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit herewith petitioned for in said cause from the [60] Judgment of the above entitled Court, entered in the above entitled Court and cause on the 11th day of February, 1931; and says that in the record and proceedings in the above-entitled cause, upon the determination thereof in the District Court of the United States for the District of Montana, there is manifest error in this, to-wit:

I.

The Court erred in concluding, deciding and ordering that the plaintiff above named, is entitled to recover, and that judgment should be entered in favor of said plaintiff and against the defendant.

II.

The Court erred in deciding that prior to December 31, 1920, the plaintiff above named granted, sold, transferred and delivered to one J. E. O'Connell of Helena, Montana, all of its property and business.

III.

The Court erred in holding and deciding that although the transfer of the property of said plaintiff on or about January 1, 1921, to J. E. O'Connell was fictitious in so far as a transfer of the former's assets to the latter was concerned, said transfer would prevail against the United States and render illegal the tax assessed by the Commissioner of Internal Revenue under the provisions of the Act of

Congress referred to as the Revenue Act of 1921 and assessed against said plaintiff as a deficiency assessment for income and excess profits taxes for the calendar year 1921.

IV.

The Court erred in holding and deciding that the plaintiff above named transacted no business in the calendar year 1921, and neither earned, received or acquired, nor was entitled to any income or profits whatsoever for or during said calendar year.

V.

That the evidence is insufficient to support the findings and conclusions of the District Court.

VI.

That the evidence is insufficient to support a finding that on or about December 31, 1920, plaintiff granted, sold, transferred or delivered to one J. E. O'Connell all its property and business. [61]

VII.

That the evidence is insufficient to support a finding that the plaintiff above named was not doing business and/or neither earned, received, acquired or was entitled to any income or profits during the calendar year 1921.

VIII.

That it affirmatively appears from the evidence herein that said plaintiff was doing business and had a taxable income during the calendar year 1921

upon which the income tax collected by the defendant herein for and on behalf of the United States, was due, legal, valid and properly collected.

WHEREFORE defendant C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, prays that said judgment of the said District Court of the United States for the District of Montana, may be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

Dated this 9th day of May, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
HOWARD A. JOHNSON,
Assistant United States Attorneys,
Attorneys for Defendant.

Personal service of foregoing Assignment of Errors, admitted and receipt of copy acknowledged this 9th day of May, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

[Endorsed]: Filed May 9, 1931.

THEREAFTER, on May 9th, 1931, defendant's petition for allowance of appeal was duly filed herein, in the words and figures following:

(Title of Court and Cause.)

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable, the District Court of the United States in and for the District of Montana:

Comes now C. A. Rasmusson as collector of Internal Revenue for the [62] District of Montana, defendant above named, acting under and by direction of a department of the Government of the United States and petitions the Court for an appeal herein and respectfully represents:

That on the 5th day of February, 1931, the Court filed its written opinion herein and on February 11, 1931, the Court issued a certificate of probable cause that the defendant herein in demanding and collecting of the plaintiff the tax complained of in the complaint acted under the direction of the Commissioner of Internal Revenue of the United States, and thereafter on February 11th, 1931, a final judgment was rendered and entered herein ordering and adjudging that the plaintiff herein do have and recover of and from the defendant the sum of \$3,819.63, together with interest thereon at the rate of six per cent per annum from November 19, 1926:

That said defendant conceiving himself aggrieved by said judgment aforesaid, respectfully represents that certain errors were committed in the said judgment and proceedings had prior thereto, to the prejudice of said defendant, all of which more fully appears from the assignment of errors, which is filed herewith;

WHEREFORE, said defendant, acting under direction of a department of the Government of the United States as aforesaid, prays that an appeal be allowed to him from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals, for the Ninth Circuit and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California, and that said judgment be reversed, set aside and held for naught.

Dated this 9th day of May, 1931.

WELLINGTON D. RANKIN,
 United States Attorney,
 ARTHUR P. ACHER,
 HOWARD A. JOHNSON,
 Assistant United States Attorneys,
 Attorneys for the Defendant
 and Appellant. [63]

[Endorsed]: Filed May 9th, 1931.

Personal service of foregoing Petition for Allowance of Appeal admitted and receipt of copy acknowledged this 9th day of May, 1931.

T. B. WEIR,
 HARRY P. BENNETT,
 Attorneys for Plaintiff.

THEREAFTER, on the 9th day of May, 1931, the Prayer for Reversal was duly filed herein, in the words and figures following:

(Title of Court and Cause.)

PRAYER FOR REVERSAL.

Comes now the defendant in the above entitled action and prays that the final judgment entered herein in the District Court of the United States in and for the District of Montana, on the 11th day of February, 1931, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further orders as may be fit and proper in the premises may be made in the above entitled cause by said Circuit Court of Appeals.

Dated this 9th day of May, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
HOWARD A. JOHNSON,
Assistant United States Attorneys.

[Endorsed]: Filed May 9th 1931.

Personal service of foregoing Prayer of Reversal admitted and receipt of copy acknowledged, this 9th day of May, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

THEREAFTER, on the 9th day of May, 1931, the order of the court allowing an appeal was duly filed herein, in the words and figures following:

(Title of Court and Cause.) [64]

ORDER ALLOWING APPEAL.

Upon reading and considering the foregoing petition for the allowance of an appeal, together with the assignments of error on file herein

It is hereby ordered that the appeal of C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, from the judgment entered in the above entitled Court and cause on the 11th day of February, 1931, be and the same is hereby allowed, and it appearing that said appeal is being brought by direction of a department of the Government of the United States, the same shall operate as a supersedeas.

Dated this 9th day of May, 1931.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered May 9th, 1931.

THEREAFTER, on the 11th day of May, 1931, the citation was duly issued herein, which original citation with admission of service thereon is hereto annexed and is in the words and figures following:

[65]

(Title of Court and Cause.)

CITATION ON APPEAL.

The President of the United States of America to Eddy's Steam Bakery, Inc., a corporation, Plaintiff and appellee, and T. B. Weir and Harry P. Bennett, Attorneys for said Plaintiff, Greeting:

You, and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal filed in the District Court of the United States for the District of Montana from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit, in a suit wherein C. A. Rasmusson as Collector of Internal Revenue for the District of Montana is defendant and appellant, and you, Eddy Steam Bakery, Inc., a corporation, are the plaintiff and appellee, to show cause, if any there be, why the judgment rendered on the 11th day of February, 1931, against said C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, mentioned in said appeal, should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Great Falls, in the District of Montana this 9th day of May, 1931.

CHARLES N. PRAY,
Judge of the District Court of the
United States, District of Montana.

Personal service of foregoing Citation on Appeal, and receipt of copy thereof admitted and acknowledged this 11th day of May, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff & Appellee. [66]

[Endorsed]: Filed May 11th, 1931. [67]

THEREAFTER, on the 29th day of June, 1931, the praecipe of the defendant for transcript of record with admission of service thereon was duly filed herein, in the words and figures following:

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled Cause, and incorporate in such transcript of record the following papers or exhibits, to-wit:

1. The Complaint of Eddy Steam Bakery, Inc., a corporation, Plaintiff.
2. The answer of the defendant, C. A. Rasmusson, as Collector of Internal Revenue.
3. The stipulation filed herein on the 16th day of July, 1930, that a jury be waived and the case tried to the Court.
4. The Bill of exceptions duly signed, settled and allowed herein.
5. The Petition filed herein on February 11th, 1931.
6. The Special finding and certificate of Probable Cause filed herein on February 11th, 1931.
7. The Judgment of the above entitled Court rendered and entered on the 11th day of February, 1931. [68]
8. The notice of entry of Judgment dated February 14, 1931.
9. The assignment of Errors of the defendant, Petitioner and Appellant.
10. The Petition for Allowance of Appeal.
11. The Prayer for Reversal.
12. The Order allowing an appeal.
13. The Citation on Appeal with Admission of Service.
14. This Praecipe with admission of service therein.

Said transcript to be prepared and fully certified by you, as required by law, and the rules of the above entitled Court, and the rules of the United

States Circuit Court of Appeals for the Ninth Circuit.

Dated this 16th day of June, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
Assistant United States Attorney,
Attorneys for defendant and appellant.

Service foregoing praecipe and receipt of copy admitted this 19th day of June, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed June 29, 1931. [69]

(Title of Court and Cause.)

Upon application of the appellant, and it appearing a proper case therefor,

It is ordered that the time for filing the transcript on appeal and docketing the above case in the Circuit Court of Appeals for the Ninth Circuit, now on appeal from the District Court of the United States for the District of Montana, be and the same is hereby extended to and including the 9th day of July, 1931.

Dated this 10th day of June, 1931.

CHARLES N. PRAY,
United States District Judge, for the District of
Montana. [70]

(Title of Court and Cause.)

ORDER.

Upon application of the appellant, and it appearing a proper case therefore,

It is ordered that the time for filing the transcript on appeal and docketing the above case in the Circuit Court of Appeals for the Ninth Circuit, now on appeal from the District Court of the United States for the District of Montana, be and the same is hereby extended to and including the 27th day of July, 1931.

Dated this 7 day of July, 1931.

BOURQUIN,
United States District Judge
District of Montana. [71]

(Title of Court and Cause.)

On motion of Mr. Arthur P. Acher, Assistant U. S. Attorney, and pursuant to stipulation filed, it is ordered that original exhibits Nos. 5 to 10 inclusive, be forwarded by the clerk of this court to the clerk of the Circuit Court of Appeals at San Francisco, California, for use by said court in considering the questions raised by appeal.

Entered in open court July 2, 1931.

C. R. GARLOW,
Clerk. [72]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 72 pages, numbered consecutively from 1 to 72, inclusive, is a full, true and correct transcript of the record and proceedings in the within entitled cause, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of sixteen and 30/100 Dollars and have been made a charge against the appellant.

I further certify that there is transmitted herewith original exhibits 5 to 10 inclusive, in said cause, pursuant to the order of the court.

Witness my hand and the seal of said court at Helena, Montana, this 22nd day of July, A. D. 1931.

(Seal)

C. R. GARLOW,

Clerk. [73]

[Endorsed]: No. 6537. United States Circuit Court of Appeals for the Ninth Circuit. C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, Appellant, vs. Eddy's Steam Bakery, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed July 25, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.

